Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-678

COLORADO RIVER WATER CONSERVATION DISTRICT; SOUTHWESTERN WATER CONSERVATION DISTRICT; NORTHERN COLORADO WATER CONSERVANCY DISTRICT; CITY OF COLORADO SPRINGS; CITY OF AURORA; BOARD OF WATER WORKS, CITY OF PUEBLO; AND THE CITY AND COUNTY OF DENVER,

Petitioners,

v.

ENVIRONMENTAL DEFENSE FUND, INC., AND DOUGLAS M. COSTLE, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE STATE OF COLORADO AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals was in error in applying the doctrine of *parens patriae* to preclude the intervention of admittedly interested parties where the state of their location, as an intervenor itself had supported their intervention and had informed the district court that it could not adequately represent the interests of those parties?

INTEREST OF AMICUS CURIAE

The State of Colorado was admitted as an intervenor-defendant in the ongoing litigation below concerning the control of salinity in the Colorado River. The petitioners sought to intervene in this litigation at about the same time as the State. The State fully supported the intervention of the petitioners because of the diverse rights and interests they represent on both the Eastern and Western Slopes of the Continental Divide, within Colorado. The State of Colorado is interested in assuring that *all* of its citizens and their concerns are adequately represented in litigation which touches so closely upon their vital interests. As the party in the district court upon whom the burden of representing many diverse interests has now been placed as a result of the Court of Appeals decision, the State of Colorado has a substantial interest in seeing that the propriety and reasonableness of that decision be reviewed. Moreover, the State of Colorado is in fundamental disagreement with the Court of Appeals conception of the political operation of states vis-a-vis cities and water districts; and, as a result further supports review of that decision by this Court.

STATEMENT AND REASONS FOR GRANTING THE WRIT

Amicus curiae adopts as its statement of the case and reasons for granting the writ the statement and reasons set forth in the Petition for Certiorari, adding the following reasons.

IMPORTANCE OF GRANTING THE WRIT

The State of Colorado strongly urges the granting of the writ of certiorari in this case not only because of the unfairness resulting here from the plain error below, but because the standard established for participation in litigation by States and their citizens is fundamentally unsound, impossible of application and unreasonable in result. It is of extreme importance that the Court grant the writ to review the appropriateness of the "political processes" standard of the D.C. Circuit. Indeed, summary reversal of the *per curiam* action below would appear warranted to permit the requisite participation by petitioners in the continuing litigation.

The court below stated that the States "may not readily relinquish their sovereign functions of resolving differences (if any) among their political subdivisions and citizens' views on water plans and rights as they relate to this case once they have intervened to represent those subdivisions and citizens." While Colorado is not aware of any action by it which warranted this statement of the court, so that there may be no misunderstanding Colorado states unequivocably that it has relinquished *none* of its sovereign functions. Indeed its intervention in this suit is clear evidence of its intention to defend those functions to the utmost. What it cannot do, however, and what it should not be *required* to do, as it would by the Circuit's broad generalizations on *parens patriae*, is to represent and defend specific interests and responsibilities of individual groups which stand to be af-

fected. At the least, this broad "sovereign function" approach should not be permitted to bar participation by an entity in the State which perceives possible damage to its interests as a consequence of litigation, which is certainly possible here, and which is not only entirely capable of defending those specific interests but has been endowed and required by the State Legislature to act in the capacity.

With respect to the petitioners here for example the laws of the State of Colorado require the Colorado River Water Conservation District and the Southwestern Water Conservation District to take great responsibility for the study, development and utilization of the waters within their respective boundaries. Specifically they are each charged with the responsibility to "perform all acts and things necessary or adviseable to secure and insure an adequate supply of water, present and future, for irrigation, mining, manufacturing and domestic purposes within said districts;" Colorado Revised Statutes 1973, 37-46-107(1)(c) and 37-47-107(1)(c). A full recitation of the powers and duties, including the right to sue or be sued may be found in Colorado Revised Statutes 1973, 37-46-107 and 37-47-107 generally. The Water Conservancy Act, Colorado Revised Statutes 1973 37-45-101 *et seq*, provides the Northern Colorado Water Conservancy District with various powers and responsibilities separate from those of the state government. As to the cities of Colorado Springs, Aurora, Pueblo and Denver, all petitioners herein, the Court's attention is respectfully directed to Article XX of the Colorado Constitution entitled "Home Rule Cities and Towns". In Article XX, Section 6 the people of the state of Colorado granted to the named petitioners and others the following:

> It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters and the enumeration herein of

certain powers shall not be construed to deny such cities and towns, and to the people thereof, any right or power essential or proper to the full exercise of such right.

The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except insofar as superceded by the charters of such cities and towns or by ordinance passed pursuant to such charters.

It is the firm position of the state of Colorado that these entities are entitled by the State Constitution to a separate position when it concerns matters of local concern and impact such as municipal water supply. *See, Colorado Open Space Council, Inc. v. City and County of Denver,* ——— Colo. ———, 543 P.2d 1258 (1975).

The mechanical application by the Court of Appeals of the *parens patriae* doctrine to the facts of this case, without consideration of the policies underlying the doctrine, sets a dangerous and unrealistic precedent for determining when citizens within a state should be permitted to intervene in litigation where their state is already a party. The doctrine of *parens patriae* was derived from the idea that the sovereign was "the general guardian of all infants, idiots and lunatics". 3 W. Blackstone, Commentaries 47; *See, Hawaii v. Standard Oil,* 405 U.S. 251, 257 (1973). The sovereign's capacity as *parens patriae* traditionally involved the state as a protector of those unable to protect themselves. *See, Hawaii v. Standard Oil, id.* at 257 (1973). In the United States the doctrine expanded from one designed to protect only those incapable of protecting themselves to one which recognized the right of a state to bring suit on behalf of all of her citizens and affirmatively to represent their common interest. *See, id.* at 258-29; *Pennsylvania v. New Jersey,* 426 U.S. 660, 665 (1975). This Court has explicitly recognized that the state when acting in its role as *parens patriae* does not displace the individual claims of its citizens:

> [A] State has standing to sue [as *parens patriae*] only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens.

Id., *see*, *Kansas v. United States*, 204 U.S. 331 (1921) (states may not invoke original jurisdiction of Supreme Court to prosecute purely personal claims of their citizens). *Accord*, *Pennsylvania v. Kleppe*, 533 F.2d 668 (D.C. Cir. 1976).

In the present case, the petitioners have a more specific and particular interest in the subject matter of the suit than that of the state acting as *parens patriae*. The State of Colorado finds highly anomalous the present situation where those interests most directly affected are denied recognition as parties by reference to a doctrine which originated only to protect those wholly unable to protect themselves and which was expanded only to permit, in certain situations, representation of the common interest so as to supplement, but not to replace, the participation of those most directly affected. The application of *parens patriae* by the court below should be reviewed by this Court so as to apply *parens patriae* in accord with its underlying policies.

Although the State recognizes the need of the judiciary to protect itself from burdensome or duplicative litigation occasioned by unnecessary parties, the circuit's decision goes beyond such protection and imposes a severe restriction on access to the courts by governmental subdivisions possessing interests in need of judicial protection.

The rapid evolution of state and local governmental units has created numerous situations where the interests of these entities are not identical and where both the State and the locality need separate representation. The divergent obligations and responsibilities of state and local governments are more visible and emergent as each day passes.

Here for example there is a clear threat involving water, a most precious resource of the state and a limited resource subject to competing rights and competing demands among not only state and local government units but with the federal government itself. These considerations suggest that the individual interests of the districts and cities petitioning here cannot be unified with those of the State of Colorado by the simple exhortation made by the court below to resort to the "political processes", anymore than the different interests of the State and federal government could be composed in this fashion. The districts and cities have interests distinct from those of the State of Colorado and as shown by the above citations, also have the responsibility to respond in protection of those interests. Because the separate interests of the districts and cities should be represented in this case and because there are interests which they only can properly and adequately represent, the decision of the Court of Appeals should be reviewed by this Court.

The decision below, if permitted to stand, will result in the denial of judicial protection to interested entities even where the need for protection of those interests is recognized by their state of location. To presume that a particular state can adequately represent the diverse interests of all of its citizens does not reflect reality. *See, U.S. v. Reserve Mining*, 56 F.R.D. 408 (D. Minn. 1978). The fact that the entity itself views its interest as unprotected should carry great weight consistent with the liberal standard for intervention adopted by this Court in *Trbovich v. UMW*, 404 U.S. 425 (1972). *See*, Wright & Miller, Federal Practice and Procedure § 1909, at 522-532 (1972). When a state declares that it cannot adequately represent the specific interests of one of its citizens, and that citizen is ready, willing and able to incur the time and expense of litigation, the doctrine of *parens patriae* is a peculiarly inappropriate authority upon which to base the court's refusal to permit that citizen's participation.

CONCLUSION

For the foregoing reasons, the State of Colorado as *amicus curiae* respectfully urges that certiorari be granted in this case.

Respectfully submitted

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